IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PROFESSIONAL ABSTRACT & ASSURANCE CORPORATION	:	CIVIL ACTION
v.	:	
ONE STOP EXPRESS FINANCIAL, LLC	:	NO. 06-4357

MEMORANDUM AND ORDER

The clerk of court entered default against One Stop Express Financial on November 30, 2006. I will grant One Stop Express Financial's motion to set that default aside.[1] This decision is within my discretion and requires consideration of this Circuit's policy which "favors disposition of cases on their merits rather than on procedural defaults. . . [D]ismissal with prejudice or default judgment . . . must be sanctions of last, not first resort." *Hewlett v. Davis*, 844 F.2d 109, 113 (3d Cir. 1988).

A brief history of the events leading up to the entry of default is necessary for an understanding of this matter.

Plaintiff, represented by John Stanley Stewart, Esq., made personal service of its complaint on November 9, 2006, which gave the defendant until November 29, 2006, to respond. The summons stated:

> YOU ARE HEREBY SUMMONED and required to serve upon Plaintiff's Attorney John Stanley Stewart, Esq., an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. *Any answer that you*

[1] The defendant's motion was to set aside the "default judgment." The clerk of court entered default, not default judgment in this case. However, the same standard applies to setting aside an entry of default as that for a default judgment. *Felciano v. Reliant Tooling Co., Ltd.*, 691 F.2d 653, 656 (3d Cir. 1982).

> *serve on the parties in this action must be filed with the Clerk of this Court within a reasonable period of time after service*.

(Mot. to Set Aside Default Ex. C)(Emphasis added).

On November 30, 2006, just one day after the answer was due, Mr. Stewart filed an affidavit with the clerk of court requesting a default judgment and, with no answer yet filed, the clerk entered default that day. In his affidavit in support of default, Mr. Stewart stated, "Defendant One Stop Express Financial, LLC has not answered or otherwise appeared in this action, and the time with which defendant may appear has expired." (Def.'s Mot. to Set Aside Default, Ex. A at ¶ 3). However, Mr. Stewart admits that "On November 29, 2006, Attorney Kevin Murphy e-mailed to Plaintiff's counsel an unsigned copy of a proposed 12(b) Motion. He also faxed a copy that was signed." (Pl.'s Resp. at 2).

Believe it or not, this is how Mr. Stewart justifies his filing the motion for default judgment on November 30, 2006.

(1) Fed. R. Civ. P. 11(a) provides that a pleading shall be signed by an attorney of record.

(2) The complaint was filed on November 9, 2006, and therefore a response was due on Thursday, November 29, 2006.

(3) Although Local Rule 5.1(a) provides that the filing of a pleading with the clerk of court shall be deemed an entry of appearance, Mr. Murphy did not file his 12(b) motion with the clerk until the following Monday, December 4, 2006.

(4) Therefore Mr. Murphy did not become an attorney of record until Monday, December 4.

(5) It follows that the document received on Thursday, November 29, 2006, though it bore Mr.

Murphy's signature, was not signed by an attorney of record and not being signed by an attorney of record was not valid and not being valid did not preclude the entry of default the following day.

I note that Fed. R. Civ. P. 11(a) provides "An unsigned paper shall be stricken unless the omission of the signature is corrected promptly after being called to the attention of the attorney or party." This section of the rule only makes sense if a subsequent signing dates back to the time the document was served. See *United States v. Kasuboski*, 834 F.2d 1345, 1348 (7th Cir. 1987) (holding that where a motion for summary judgment was faxed unsigned on the date due, and a signed copy was mailed three days later, the initial faxing date was valid). Otherwise, in many if not all instances, it might as well be stricken. If there is a doctrine of nunc pro tunc signing, I invoke it. If there is no such doctrine, I invent it.

Returning now to Mr. Stewart's line of reasoning and taking it to its logical conclusion, the "unsigned" Rule 12(b) motion that had been served upon him on Thursday, November 29, became signed by an attorney of record the following Monday when Mr. Murphy entered his appearance by filing the motion with the clerk of court. At that juncture, the appropriate thing for Mr. Stewart to have done was to contact the clerk and on his own motion have the default set aside. Instead, he filed a six page, single-spaced brief opposing the setting aside of the default, a brief that was replete with cases that commented that defaults are not favored in the law.[2]

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[2] The following cases are cited by the plaintiff in its Response to Motion to Set Aside Default: *Felciano*, 691 F.2d at 656 ("[I]n passing upon default judgments Rule 60(b) should be 'given a liberal construction . . . any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits."); *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71, 75 (3d Cir. 1987) ("[D]ismissal must be a sanction of last, not first, resort."); *Scottsdale Ins. Co. v. Littlepage*, No. 92-2734, 1993 WL 275162, at *2 (E.D. Pa. July 16, 1993) ("Our Court of Appeals . . . does not favor defaults and requires that doubtful cases be resolved in favor of the party moving to set aside the default so that cases may be decided on their merits." (internal quotation and citation omitted));*Grow Tunneling Corp. v. Conduit & Found. Co., Inc.* , No. 96-3127, 1996 WL 411658, at *2 (E.D. Pa. July 16, 1996) ("In the Third Circuit, however, default judgments are disfavored. Instead, litigation is to be resolved on the merits."). In *Grow*, the court also noted that defendant did not have advance notice of the request for default,

To determine whether Mr. Murphy's motion to set aside should be granted, I consider four factors:

> (1) whether lifting the default would prejudice the plaintiff; (2) whether the defendant has a prima facie meritorious defense; (3) whether the defaulting defendant's conduct is excusable or culpable; and (4) the effectiveness of alternative sanctions.

Emcasco, 834 F.2d at 75.

With them must be applied Fed. R. Civ. P. 1, that is, these rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

First, there is no prejudice to the plaintiff as the delay was one business day, and in fact, Mr. Murphy's "unsigned" motion was actually in Mr. Stewart's left hand when his right hand moved for default judgment. Second, an examination of the complaint in this action and the complaint in a prior action between the same parties show the defendant presents a prima facie meritorious defense. *See Mike Rosen & Assocs., P.C. v. Omega Builders*, 940 F. Supp. 115, 118 (E.D. Pa. 1996).

The third factor, culpable conduct, was well-defined by Judge Pratter in a recent decision where she noted that a defendant's delay must be "willful or in bad faith" and that "even where the Court cannot condone a defendant's failure to respond to a lawsuit for an extended period of time, culpable conduct warranting the refusal to set aside default must rise to the level of flagrant bad faith and callous disregard of responsibility." *Griffen v. Alpha Phi Alpha, Inc.*, 2006 U.S. Dist. LEXIS 82435, at *12-13 (E.D. Pa. Nov. 9, 2006) (internal quotations and citations omitted).

Here, there has been no bad faith or callous disregard of responsibility on the part of the

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which isn't required, but stated, "Nonetheless, as a matter of professional courtesy, [the plaintiff] should have notified [the defendant] of its intent to request a default and default judgment." *Id.* at 6.

defendant. He filed his response within one business day of its due date and in so doing, he complied with the language of the summons itself (mirroring that of Federal Rule of Civil Procedure 5(d)), which allowed him to file with the court "within a reasonable period of time after service." If either party is guilty of culpable conduct in this case, it is surely counsel for the plaintiff.

The fourth factor requires consideration of alternative sanctions to default. Having noted that the plaintiff had a copy of the defendant's response within the time required in the summons, that the defendant filed his response with the Clerk within one business day of the summons-deadline, that the defendant's delay did not prejudice the plaintiff, and that defendant's counsel was not guilty of a callous disregard of his duty, I conclude the default should be set aside and that no sanctions against the defendant should be imposed.

An appropriate Order follows.

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ORDER

AND NOW, this 5th day of January, 2007, upon consideration of Defendant One Stop Express Financial, LLC's Motion to Set Aside Default Judgment (Dkt. # 8) and Plaintiff Professional Abstract & Assurance Corporation's Response (Dkt. #7), IT IS HEREBY ORDERED that Defendant's Motion to Set Aside Default Judgment is GRANTED and the Clerk of Court shall remove entry of default against One Stop Express Financial, LLC.

BY THE COURT:

/s/ J. William Ditter, Jr.
J. WILLIAM DITTER, JR., S.J.